No. 10-263

IN THE

Supreme Court of the United States

SONY MUSIC ENTERTAINMENT, ET AL.,

Petitioners,

v.

KEVIN STARR, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONERS

Despite plaintiffs' attempts to confuse the nature of the issues and distract the Court's attention from the question presented, there is no dispute that the Second Circuit squarely held that the substantive legal standard applicable to plaintiffs' claim at summary judgment and trial does not govern at the pleading stage. Pet. 3, 9; Opp. 27. That holding is in conflict with this Court's precedents and inconsistent with decisions of other courts of appeals, and merits this Court's review.

Plaintiffs' principal response is that petitioners seek to impose a "probability" standard on allegations in a complaint, but that argument is baseless. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), establishes the governing procedural requisites at the motion-to-dismiss stage—plaintiffs must allege facts establishing a "plausible entitlement to relief" (*id.* at 559)—but the substantive standard governing the claim remains the same at each stage of the case. Here, that standard requires plaintiffs to allege facts that plausibly "tend to exclude" independent, self-interested conduct as an explanation for the defendants' alleged behavior.

Plaintiffs' remaining attempts to obscure the clarity of the question presented are without merit and provide no basis for denying review.

I. THE SECOND CIRCUIT'S DECISION CONFLICTS WITH *TWOMBLY* AND *IQBAL*

Under *Twombly* and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), plaintiffs must plead facts that plausibly show "entitlement to relief" (*Twombly*, 550 U.S. at 559); that is, facts that could satisfy the substantive legal standards that would govern the claim at summary judgment or trial. Pet. 12-16; *see also*

Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 346 (2005). Plaintiffs argue that this rule would create a "probability" standard at the pleading stage. Opp. 11. It does not.

Plaintiffs are not required to prove their case at the pleading stage or show that it is more likely than not they will prevail; but they must allege facts that show a "plausible entitlement to relief." *Twombly*, 550 U.S. at 559. To be sure, the *procedural* requisites change at later stages of litigation: At summary judgment, a plaintiff may proceed to trial only if the evidence obtained during discovery raises a "genuine dispute as to [a] material fact" (Fed. R. Civ. P. 56(a)), and a plaintiff must have "a legally sufficient evidentiary basis" for a favorable ruling to avoid a directed verdict (*id.* 50(a)(1)). But while the procedural standards differ at each stage of a case, the substantive legal standard remains constant.

Despite plaintiffs' claim that "[n]o court has adopted [the] argument that *Twombly* and *Iqbal* . . . require . . . that [a] complaint allege facts sufficient to 'satisfy the same substantive legal standard that applies at summary judgment or trial'" (Opp. 11), that was precisely this Court's mode of analysis in *Twombly* and *Iqbal* themselves. In *Twombly*, the Court analyzed antitrust cases decided at the summary judgment, directed verdict, and trial stages. *See* Pet. 12-14. The Court concluded that because, *at those later stages*, evidence of parallel conduct alone is insufficient to state a claim for unlawful conspiracy, the same standard applied to the allegations in the complaint at the pleading stage. *See id.*

In *Iqbal*, the Court likewise examined cases decided at summary judgment and trial, and concluded that because plaintiffs must *prove* unlawful intent at those stages, they must also *plead* unlawful intent in

their complaint. *See* Pet. at 14-15; *accord Dura*, 544 U.S. at 346.

Plaintiffs' reading of *Twombly* finds no refuge in this Court's discussion of Judge Lynch's district court opinion in that case. 550 U.S. at 552. Refuting plaintiffs' attempt (Opp. at 17-18) to suggest that his opinion limited the "tends to exclude" standard to the summary judgment phase, Judge Lynch explicitly stated that "district courts have required" plaintiffs to meet that same standard "in order to withstand motions to dismiss." *Twombly v. Bell Atl. Corp.*, 313 F. Supp. 2d 174, 179-80 (S.D.N.Y. 2003). The court below read Judge Lynch's opinion the same way: "the district court [in *Twombly*] . . . held that plaintiffs must allege additional facts that tended to exclude independent, self-interested conduct." Pet. App. 18. This Court approvingly cited that reasoning in *Twombly*, 550 U.S. at 552, and it directly conflicts with the Second Circuit's decision here.

Plaintiffs also attempt to find support for their position in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002). But *Twombly* clarified that *Swierkiewicz* held only that a plaintiff need not engage in "heightened fact pleading of specifics" if the facts contained in a complaint suffice to state a claim for relief. 550 U.S. at 570. It was plausible that the allegations in *Swierkiewicz* would be substantiated by direct evidence of discrimination, and thus this Court did not require the plaintiff to "allege certain additional facts that [he] would need at the trial stage to support his claim *in the absence of direct evidence*." *Id.* (emphasis added); *see* Pet. 16 n.3. But this Court did not hold that a complaint could survive a motion to dismiss without pleading facts consistent with *any* substantive theory of liability. That is what the plaintiffs attempted to do in *Twombly*, and what plaintiffs attempt to do here.

In short, plaintiffs are unable to explain away the conflict between the decision below and *Twombly*, *Iqbal*, and *Dura*. Moreover, even if there were some remaining confusion regarding the import of *Swierkiewicz* in light of *Twombly* and *Iqbal*—and there is not—that would hardly militate against further review. Instead, it would simply confirm the need for this Court to grant certiorari and clarify the important issue of law presented by the petition.

II. THE HOLDING BELOW CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS

Plaintiffs' analysis of decisions from other circuits does nothing to diminish the conflict among the courts of appeals on the proper substantive standard to apply when evaluating the plausibility of allegations in a complaint.

First, plaintiffs do not dispute that the Third Circuit recently held that "plaintiffs relying on parallel conduct must allege facts that, if true, would establish at least one 'plus factor,' since plus factors are, by definition, facts that 'tend[] to ensure that courts punish concerted action—an actual agreement—instead of the unilateral, independent conduct of competitors.'" *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 323 (3d Cir. 2010) (citation omitted); *see also* Opp. 32. Plaintiffs downplay this holding as a "single phrase" in a long opinion (Opp. 32-33), but it is nonetheless an explicit holding of the Third Circuit, binding on all federal courts in that circuit. And that holding conflicts with the decision below, which held that plaintiffs can survive a motion to dismiss without pleading *any* factors tending to exclude the possibility of independent action.

Second, plaintiffs do not dispute that the Eighth Circuit has held that, where "obvious alternative ex-

planation[s]" exist for a defendant's conduct, "a plaintiff may be required to plead additional facts tending to rule out the alternative." *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 597 (8th Cir. 2009); *see also* Opp. 34. They simply object that petitioners failed to offer an "obvious alternative explanation" here, which—as explained below—is incorrect. *See infra* pp. 8-9.

Third, plaintiffs do not dispute that the Sixth Circuit held that the "tends to exclude" standard "illuminates the plausibility" of allegations in antitrust complaints. *Tam Travel, Inc. v. Delta Airlines, Inc.*, 583 F.3d 896, 907 n.7 (6th Cir. 2009); *see also* Opp. 28. They merely point out that the court did not explicitly state that plaintiffs are required to plead such facts. But unlike the Second Circuit, the Sixth Circuit clearly held that the summary-judgment standard was *relevant* in determining whether a complaint's allegations were plausible. That mode of analysis cannot be reconciled with the decision below. [1]

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[1] The decision below is also inconsistent with the Eleventh Circuit's recent decision in *Jacobs v. Tempur-Pedic Int'l, Inc.*, No. 08-12720, 2010 WL 4880864 (11th Cir. Dec. 2, 2010). Relying on *Twombly* and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (2010 WL 4880864, at *9-*10), the court dismissed an antitrust conspiracy claim because the plaintiffs did not meet their "burden to present allegations showing why it is more plausible" that the alleged co-conspirators "would enter in an illegal price-fixing agreement . . . to reach the same result realized by purely rational profit-maximizing behavior." *Id.* at *9. *Jacobs* cannot be squared with the Second Circuit's holding that plaintiffs can survive a motion to dismiss without pleading any factors that plausibly tend to exclude the possibility of independent action.

III. THERE ARE NO CASE-SPECIFIC OBSTACLES TO THIS COURT'S RESOLUTION OF THE QUESTION PRESENTED

Plaintiffs attempt to avoid review by characterizing the decision below as fact-dependent and accusing petitioners of failing to refute specific facts in the complaint. These arguments are without merit.

1. Plaintiffs complain that petitioners failed to explain how two statements by industry executives alleged in the complaint could be consistent with independent, self-interested conduct. Opp. 10-11. Plaintiffs mischaracterize these statements and fail to explain how this argument counsels against certiorari.

The Second Circuit committed a pure error of law: It held that plaintiffs were not required to plead facts sufficient to raise a plausible claim of entitlement to relief under the substantive legal standard governing their claim, which requires that the proffered facts "tend to exclude" independent, self-interested behavior. Pet. App. 18. That the court of appeals considered "fourteen separate facts" in conducting its analysis is *irrelevant* (Opp. 2)—it did so under the wrong substantive standard.

In any event, petitioners demonstrated below that plaintiffs' allegations do not plausibly show entitlement to relief, because they describe the lawful behavior of joint ventures setting the prices and terms of the venture's own products. *See* Mem. in Support of Defs.' Mot. to Dismiss 11 & n.8 ("[I]t is well-established that joint ventures are free to set the terms and requirements under which the joint venture will operate."); Appellees' Br. 27 (same). That is a complete response to the two statements cited by plaintiffs.

First, plaintiffs mischaracterize (through use of a bracketed insertion) a quotation by Edgar Bronfman, Jr., currently CEO of Warner Music Group (one of the petitioners). According to plaintiffs, he stated that "we [the *music industry*] determine" Internet Music prices. Opp. i (emphasis added). To the contrary, Bronfman's quotation referred to *pressplay*, one of the two joint ventures, setting the price for its own product sold by its agent distributors. Pet. App. 93a ("*Pressplay* has what we call an affiliate model where *we determine the price*, and we offer a percentage of that price to the retailing partner . . .") (emphasis added). It is lawful for members of a joint venture to set the prices that the *joint venture* will charge for its products (*see Texaco Inc. v. Dagher*, 547 U.S. 1, 8 (2006)), and it is indisputably within each member's self-interest to do so.

Second, plaintiffs point to an industry executive's statement that there are "legal/antitrust reasons" why a "most favored nation[]" clause should be included in an alleged side letter rather than in a licensing agreement between EMI and its joint venture, MusicNet. Opp. 3; Pet. App. 95a.[2] According to the complaint, this letter memorialized an agreement that EMI's economic terms would be as favorable as those of the other two co-venturers in MusicNet. Pet. App. 95a (¶¶ 94, 95). There is nothing anticompetitive or contrary to individual self-interest about an agreement among co-venturers to enter their common enterprise on an equal footing. *See Dagher*, 547 U.S. at 8. And in any event, a nonlawyer's speculations about the appearance of im-

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[2] Plaintiffs attribute this comment to Rob Glaser, erroneously identified as "EMI CEO." Pet. App. 95a (¶ 95). It is a matter of public record that Mr. Glaser worked for MusicNet, not EMI.

propriety under antitrust law does not plausibly allege a conspiracy.

2. Plaintiffs concede that the Second Circuit was obligated to consider "'obvious alternative explanation[s]'" for petitioners' conduct, and "'to draw on its judicial experience and common sense'" in reviewing the complaint. Opp. 24 (quoting *Iqbal*, 129 S. Ct. at 1950). They argue, however, that there was no "obvious alternative explanation" here, because petitioners "have not explained how their alleged conduct made economic or common sense as a response to 'Internet piracy.'" Opp. 25.

Plaintiffs are wrong. An industry commentator stated in an article on which plaintiffs' complaint relies that petitioners' motivation in forming the joint ventures was to "'protect their copyrighted works from freewheeling swapping on the Internet, and to pick up a few extra bucks for making the music available digitally.'" Pet. 22 n.5 (quoting Tom Spring, *Digital Music: Worth Buying Yet?*, PC World, Jan. 18, 2002); Pet. App. 89a n.2. Plaintiffs cannot credibly claim that the article on which they heavily rely fails to "comport with common sense." Opp. 24.

Moreover, contrary to plaintiffs' claims, petitioners explained in the lower courts that "[t]he joint ventures, in order to control piracy, restricted their subscribers to 'tethered' downloads or 'streams' so that a subscriber could not capture a song file on his or her computer and transfer it to non-subscribers, portable devices or CDs." Appellees' Br. 12 n.7; *see also* Mem. in Support of Defs.' Mot. to Dismiss 16-17 (similar). As the district court understood, usage restrictions made perfect sense as a "collaborative effort to address widespread music piracy." Pet. App. 45a.

Contrary to plaintiffs' conspiracy allegations, it is much more plausible that the joint ventures were

unprofitable because petitioners were unsuccessful in their initial attempt to package and sell Internet Music in a form that was attractive to consumers while also protecting their copyrighted work from Internet piracy. The court of appeals' failure to consider this "obvious alternative explanation" conflicts with *Twombly* and *Iqbal*.

Because the erroneous legal principle adopted by the court of appeals conflicts with *Twombly*, *Iqbal*, and *Dura* and will create confusion for courts attempting to apply this Court's precedents, certiorari is warranted to resolve that conflict. *See* Pet. 12-16. If this Court were to grant review and correct (for a third time) the Second Circuit's erroneous approach to assessing pleadings at the motion-to-dismiss stage, the Court in its discretion could (as in *Twombly* and *Iqbal*) then proceed to apply that standard to the allegations of the complaint, but such an approach would serve only to provide further guidance for the lower courts.[3]

IV. THE QUESTION PRESENTED WAS BOTH PRESSED AND PASSED UPON

Their other arguments unavailing, plaintiffs fall back on the baseless claim that the question presented was waived below. Opp. 26-27. But waiver occurs "only when the question presented was not pressed or passed upon below" — a "rule [that] operates (as it is phrased) in the disjunctive." *United States v. Williams*, 504 U.S. 36, 41 (1992). The issue

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[3] Alternatively, of course, the Court could remand for further proceedings. That course would not be necessary here: The district court, under the correct legal standard, had no difficulty ruling for petitioners. Pet. App. 32a-67a. Indeed, plaintiffs do not even contend that their complaint could pass muster under that standard.

here was *both* pressed *and* passed upon, and is therefore squarely presented.

Petitioners devoted an entire section of their appellate brief to the argument that "The 'Tends To Exclude' Standard Applies At The Motion To Dismiss Phase." Appellees' Br. 15-19. And as plaintiffs admit (Opp. 27), the Second Circuit explicitly considered, and rejected as "incorrect," petitioners' argument to that effect. Pet. App. 18a. The Second Circuit thus held that a plaintiff alleging a Section 1 violation need not test a complaint's plausibility against the substantive legal standard that governs at summary judgment or trial. That is precisely the issue on which petitioners seek this Court's review.[4]

V. POLICY CONSIDERATIONS SUPPORT THIS COURT'S REVIEW

Finally, the policy concerns advanced by plaintiffs do not counsel against certiorari.

Plaintiffs claim that the legal standard advanced by petitioners would promote "corporate self-interest and the market" over "judicial and regulatory deterrence." Opp. 1. *Dura*, *Twombly*, and *Iqbal*, however, establish an equal-opportunity pleading standard that applies to *all* federal causes of action, regardless of the identity of the parties. *See Iqbal*, 129 S. Ct. at 1952.

Plaintiffs also argue that the Court should accept the view expressed in an antitrust treatise that the

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[4] Plaintiffs also fault petitioners for citing *Dura*, 544 U.S. 336, for the first time in their petition for certiorari. Opp. 22. When, as here, the question presented was pressed and passed upon below, however, this Court will not deem the issue waived merely for failure to cite a specific authority in the court of appeals. *See generally* Eugene Gressman et al., *Supreme Court Practice* 6.26(b) (9th ed. 2007).

"tends to exclude" standard does not apply at the pleading stage. Opp. 13 & n.7. This Court need hardly defer to a particular academic opinion on an issue of pleading standards. In any event, other commentators have read *Twombly* to require the pleading of facts that satisfy the legal standard applicable at summary judgment or trial.[5] That the question presented has drawn scholarly commentary and debate simply illustrates its importance and confirms the need for this Court's review to resolve the conflict by clarifying the appropriate legal rule.

CONCLUSION

For the reasons stated herein and in the petition, certiorari should be granted. The Court may wish to consider summary reversal.

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[5] *See, e.g.*, Mark Anderson & Max Huffman, Iqbal, Twombly, *and the Expected Cost of False Positive Error*, 20 Cornell J.L. & Pub. Pol'y 1, 52 (2010) (describing the "essential step required of circumstantial allegations by *Twombly* of tending to exclude the possibility of unilateral conduct"); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. Rev. 431, 450 (2008) ("[I]t seems . . . the Court . . . held that the additional evidence that will be required at trial (and at the summary judgment stage) to prove an agreement based on parallel conduct—evidence that must tend to exclude the possibility of independent action—must be alleged at the pleading stage.") (footnote omitted).

Respectfully submitted.

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